JUN 26 1989

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
02061-095
Box 1700
Black Canyon Stage 1
Phoenix, Arizona 85029

QUESTIONS PRESENTED FOR REVIEW

I. Is it an abrogation of the presumption of innocence to condition pretrial release upon a guilty plea?

II. Is the Pretrial Detention Act, 18 U.S.C. §3142(e), unconstitutional when applied for reasons other than those specified by Congress?

III. May a conviction stand which is based solely upon evidence which the jury was instructed to ignore?

IV. Is it a denial of due process to refuse without hearing a motion for new trial which very substantially impeached the heart of the government's case?

V. Is due process satisfied by an appellate court review which fails to consult the record to verify the existence of "evidence" argued by the prosecutor but denied by the petitioner (and absent from the record)?

VI. Is a defendant barred from using the government's evidence at the suppression hearing to establish his Fourth Amendment standing?

VII. Was the petitioner denied his right to testify on his own behalf?

VIII May a conviction stand which is materially facilitated through deliberate improper use of the pretrial detention act?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Cases and Authorities	iv
Statement of Jurisdiction	v
Constitutional Provisions Involved	v
Statement of the Case	1
The Detention Proceedings	7
The Trial	20
Motion For a New Trial	25
Sentencing	27
Impairment of the Defense	29
The Appeal	34
Argument	
I. It is an abrogation of the presumption of innocence to condition pretrial release upon a guilty plea.	38
II. The Pretrial Detention Act, 18 U.S.C. §3142(e), is unconstitutional when applied for reasons other than those specified by Congress.	40
III. A conviction may not stand which is based solely on evidence the jury was instructed to ignore.	43

TABLE OF CONTENTS
continued

Page

IV. It was a denial of due process to refuse without hearing a motion for new trial which very substantially impeached the heart of the government's case. 45

V. An appellate court review which fails to consult the record to verify the existence of "evidence" argued by the prosecutor but denied by the petitioner (and absent from the record) does not satisfy due process. 54

VI. A defendant is not barred from using the government's evidence at the suppression hearing to establish his Fourth Amendment standing. 57

VII. The petitioner was denied the right to testify on his own behalf. 59

VIII A conviction which is substantially facilitated through deliberate improper use of the pretrial act cannot stand. 60

Conclusion 63

TABLE OF CASES AND AUTHORITIES

Page

CASES

Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 60

Fassler v. United States, 858 F.2d 1016 (1988) 12, 60

Rea v. United States, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292 60

United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) 3, 40, 41

AUTHORITIES

United States Code

18 U.S.C. §3142(d) 5
18 U.S.C. §3142(e) i, 5, 40, 41
18 U.S.C. §3142(j) i, 39, 40, 42
18 U.S.C. §3145 v

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit in their case number 87-3915 for which certiorari is sought was rendered in an unpublished opinion filed December 28, 1988, and is reproduced in Appendix A. Rehearing was denied April 28, 1989. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. §3145.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner has been deprived of his Fifth and Fourteenth Amendment rights in not being afforded due process of law.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall any state deprive any person of life, liberty or property, without due process of law:...

Further, petitioner was deprived of his Eighth Amendment rights in being required to post excessive bail.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that:

> Excessive bail shall not be required...

STATEMENT OF THE CASE

How do you support a conviction for which there is no evidence?

One way is to falsely argue to the Court of Appeals that there is a recorded admission in evidence. That is what the government did in this case, after having spent half the trial "explaining" to the jury why no such recording existed.

This was after the government refused this petitioner pretrial bail except in return for a guilty plea;

After this petitioner was denied his right to offer testimony on his own behalf at the detention hearing;

After this petitioner was denied the opportunity to offer his own testimony at the suppression hearing;

After this petitioner was denied the right to impeach the government's

prime witnesses with their own earlier testimony at trial;

After the prosecutor in his closing argument reminded the jury of testimony which had been excluded during the trial that the petitioner had a prior record; and

After the District Court was deliberately told in the presentence report that the petitioner had shot and killed two DEA agents while resisting arrest--even though the probation officer had already investigated that representation by the prosecutor and knew it to be false.

That is how you get a conviction without evidence. And that is how you secure a 25 year sentence in a case for which the Parole Commission guidelines are 12 months.

In this case the United States has stipulated that it used pretrial detention as a plea-bargaining tool.

On May 25, 1987, this Court filed its opinion in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The following day, May 26th, Peter Affolter was arrested in New Mexico while driving on the highway with 162 pounds of marijuana. Federal D.E.A. Agents, together with New Mexico and Louisiana State Troopers, then took Affolter and his marijuana to Baton Rouge, Louisiana, where on May 28th they instructed him to make telephone contact with the petitioner, Lawrence Fassler, and to request that petitioner come to Baton Rouge to assist him with car trouble.

Affolter made at least two recorded telephone calls, during the second of

which he asked the person to whom he was speaking for assistance. Approximately two hours later, petitioner and Charles Lee drove up to Affolter's disabled station wagon in a pickup truck. As they approached, Affolter jumped out of his vehicle and ostentatiously directed them to park immediately behind his vehicle. The arrival of Lee and petitioner, and subsequent events at the scene, were videotaped and recorded.

In compliance with his prior instructions from the D.E.A., Affolter then asked petitioner a question designed to trick petitioner into giving an incriminating answer. Instead, petitioner replied "Huh?" Affolter then repeated his question, and petitioner's second response ("How should I know?") does not appear on the videorecording. Lee and petitioner were arrested moments

later, and no further conversation occurred between Affolter and petitioner.

The initial appearance was held on May 29, 1987, before the Honorable Stephen Reidlinger, U.S. Magistrate. The petitioner was initially ordered held for ten days pursuant to 18 U.S.C. §3142(d). Although petitioner had been told by D.E.A. Agents prior to the hearing that no detention motion would be filed, an oral detention motion was made by Asst. U.S. Attorney Bradley Myers for detention pursuant to 18 U.S.C. §3142(e), and the motion was set for a later hearing.

Immediately after the Initial Appearance, D.E.A. Agent Claude Davidson told petitioner that the detention motion had been made as a ploy by the

U.S. Attorney, and would be withdrawn before it was heard by the court.

On June 1, 1987, Asst. U.S. Attorney Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the petitioner would plead guilty to charges carrying a maximum exposure of 30 years.

On June 9, 1987, the U.S. Attorney informed Rosemary Bickford and the petitioner that the government would drop the detention motion only if the petitioner pled guilty to charges carrying a maximum exposure of 20 years.

On June 11, 1987, D.E.A. Agent Ed Descenzo, specifically claiming to speak with the authorization and approval of U.S. Attorney Bradley Myers, told defense counsel Bickford and the petitioner that the government would drop the detention motion if the petitioner

would first pay over to the D.E.A. the sum of Two Hundred Thousand to Two Hundred Fifty Thousand Dollars ($200,000-$250,000).

THE DETENTION PROCEEDINGS

The detention hearing was held before Magistrate Reidlinger on June 12, 1987. The U.S. Attorney eliminated risk of flight as a basis for the requested detention,[1] and the U.S. Magistrate ruled out danger to witnesses:

> [Danger to witnesses] is not one of the basis that they're urging for a detention. (R.T., p. 13)

The Magistrate then barred the defense from cross-examining DEA Agent Giganti as to statements she had just made suggesting such a basis.

---

[1]U.S. Attorney Myers: "I think that as a practical matter, the evidence is probably not sufficient to show that he is a risk to flee...I think that we would be silly to argue that he is a risk to flee." (Transcript of Hearing, pp. 72-73).

As to dangerousness to the community, the only remaining basis, the government offered the following:

Testimony of DEA Agent Gigante: (At transcript p. 3).

Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?
A Yes, Sir.
Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?
A Yes, Sir, he was.
Q Would you tell the Court what he was indicted for, please?
A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.
Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?
A Marijuana.

(Hearing Transcript, p. 4):

Q Do you know approximately how much:
A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

Q In doing your background check on Mr. Fassler, were you able to determine if he has any prior criminal convictions?
A Yes, he has a murder conviction from 1971 and a federal drug conviction and a state drug conviction.

Q Have you been able to obtain any information whether Mr. Fassler is currently on bond or on parole or probation for any other drug offense other than the one he's now under arrest for?

A Yes, Sir, when we arrested him he was out on bond for another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport that was found to contain marijuana.

Q During your investigation have you been able to determine whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also involved in heroin dealings.

Q And would you relate to the Court what information -- or why that information -- what the information is that has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in Tucson that was received in -- at the New Orleans Airport and found to contain heroin.[1]

MR. MYERS: I have no further questions, your Honor.
THE COURT: Cross-examination.

(Page 8):

Q You also indicated that there was some -- you had some knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.
A Yes.
Q Okay. Do you know how much that involved?
A I was told a suitcase full. I'm
Q I'm sorry.
A I was told a suitcase full. I -- I do not know the exact amount.
Q Okay. You don't know anything about that?
A No, I do not.

"[1]On June 11, 1987, the previous day, the petitioner had learned from Tucson DEA agents that this incident had occurred two years before, and that someone other than the petitioner had been identified as having made the shipment."

The testimony of Miss Giganti was rebutted in several ways. First, Giganti herself testified that she knew of no other indictments or charges pending against the petitioner for anything. (RT, p. 73, lines 5-15).

The U.S. Attorney acknowledged to the court that the petitioner's priors were 20 years old. (RT, p. 73, lines 20-22).

The petitioner presented witnesses who had come from Arizona and California to testify at the detention hearing. His wife testified to his extensive family and business ties in Arizona, and his 40 years in the same home. Similar testimony was also given by Agent Giganti.

Petitioner's employer testified to his job and his role in the company. All the witnesses agreed that the

petitioner travelled extensively in connection with his business activities at PageAmerica and in buying and selling rare stamps and attending stamp shows.

The court refused to allow the petitioner to submit evidence by proffer, as is specifically allowed by statute, unless he would also testify. (RT, p. 63, lines 19-23). In Fassler v. United States, 858 F.2d 1016 (1988), now before this Court in Docket No. 88-1717, the Fifth Circuit found that this was error. The court also refused to allow the petitioner to take the stand without opening himself up for cross-examination on matters outside the scope of his direct testimony. (RT, pp. 66 and 67).

The great bulk of the detention hearing was a search by the U.S. Attorney for suspected hidden assets of the petitioner. Although no such assets

were ever established, he also argued for a high bond based upon the petitioner's possible ability to make one. (RT, p. 74, line 13, through p. 75, line 7). He also suggested to the court that the petitioner had paid his Arizona attorney a quarter of a million dollars in fees during 1984 and 1985.

The Magistrate found that:

> There wasn't much testimony on the weight of the evidence against the person,...(p. 82, lines 15-16).

but nevertheless ordered detention.

The detention hearing was reopened on June 19, when the defense put on Stanton Bloom, petitioner's attorney in Arizona. He testified about the facts of the April arrest of the petitioner in Tucson, and introduced documentary evidence seriously suggesting the grand

jury indictment in Tucson had been secured with false testimony.[2]

Mr. Bloom also established that the quantity of marijuana involved in the Arizona case was very small, and that he had no knowledge of any heroin, or any other, charges against the petitioner.

He also testified that he had received $24,000 in fees in 1984 and 1985, rather than the $250,000 suggested by the U.S. Attorney.

Finally, Mr. Bloom testified extensively about the ability and willingness of the Federal Pretrial Services in Tucson to monitor the petitioner if he were released on bail.

The government's cross-examination of Mr. Bloom consisted entirely of

---

[2]On July 10, 1987, the Arizona court reached that determination, and voided the indictment. It has since been dismissed with prejudice.

questions relating to the petitioner's finances and to fees paid to defense counsel. The Magistrate overruled objections and ordered that they be answered.

The hearing was then continued until June 24th, for argument by counsel and a ruling.

On June 24, 1987, prior to the hearing, Magistrate Reidlinger met in chambers with the U.S. Attorney and defense counsel. The petitioner was unaware that the meeting was taking place. At that meeting, the magistrate was informed by the U.S. Attorney and by defense counsel that the government was not alleging heroin involvement and threat of violence as reasons for the detention motion.

At the same time Magistrate Reidlinger told defense attorneys

Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the petitioner agreed with D.E.A. agents in Tucson, Arizona, to act as a confidential informant for them.

Magistrate Reidlinger then opened the hearing and reaffirmed his earlier detention order.

On August 11, 1987, the defense filed a motion for review of the detention order by the District Court Judge. The motion was set for August 21st at 10:00 a.m., a date and time already scheduled for an evidentiary hearing on a pending suppression motion. (CT 36).

On August 18th, the court issued an order denying the suppression motion and cancelling the pending evidentiary hearing. (CT 133). Late on August 20th, defense counsel Nathan Fisher was notified by phone that the motion to

reconsider the detention order would be heard the following day. (RT, 8/21/87, pp. 8-10). Some discussion was had on August 21st and at a status conference on August 27th an evidentiary hearing was rescheduled for September 3rd.

At the conclusion of the September 3rd hearing, the court took the motion to review the detention order under advisement. During that hearing the United States Attorney admitted that he had used the detention motion for plea-bargaining purposes, and stipulated that he had conditioned dropping the detention motion upon a guilty plea. (RT, 9/3/87, p. 8, lines 12-18) (Appendix D).

On Friday, September 4th, the petitioner sent a pro se Petition for Writ of Habeas Corpus to the District Clerk by Federal Express from Tucson, where he had had it typed. It was received by

the Clerk on September 7th (Appendix F), but not filed until September 10th, the same date on which the judge denied the motion for review of the detention order which was still pending. The pro se petition was submitted bearing the criminal case number, but was given a separate civil number by the Clerk. It was also brought to the attention of the judge, who demonstrated familiarity with it at the next hearing on September 15th.

The trial began three business days later, on September 15th. During jury selection proceedings the petitioner, through counsel, filed a pro se Motion for Continuance (Appendix E), which described the problems petitioner was having with his counsel and misrepresentations which counsel had made to him regarding a continuance and appeal of

the detention motion. The pro se motion also described many prejudices to petitioner by reason of the existing detention motion, and incorporated by reference the Petition for Writ of Habeas Corpus filed the previous week. On their face, both the Motion for Continuance and the Petition for Writ of Habeas Corpus incorporated each other, so as to inextricably entwine both cases.

The Motion for Continuance was denied from the bench, and the court then deferred ruling on the Petition for Writ of Habeas Corpus until after the trial, when it would clearly be moot.

Subsequent handling of the Habeas Corpus is described in Docket No. 88-1717, now before this Court.

THE TRIAL

The very brief trial in this matter consisted of little more than police testimony about the arrest of Affolter in New Mexico, their efforts to entrap the petitioner, and subsequently stricken testimony by a DEA agent that the petitioner had a prior record and that Affolter had said he was involved in Affolter's crime.

When the police brought Affolter to Baton Rouge, they had him make two telephone calls, which were recorded. Although petitioner's voice does not appear on the videotape, Louisiana State Troopers Mixon and Trapp both testified that they compared the voice of the second party to those recorded phone calls with the petitioner's voice on the videotape of the arrest, and that it was the same. (RT, p. 78, line 21, through

p. 79, line 6; and RT [Mixon], p. 12, line 17, through p. 14, line 4, and p. 51, lines 4-12).

Trooper Mixon testified at length as to his theory why no incriminating response by the petitioner appeared on the videotape. He then went on to testify that he was nevertheless able to hear petitioner make some kind of an affirmative response from his vantage point in a sealed van behind a gas station, (RT [Mixon], p. 26, lines 2-5), 75-100 yards away (RT [Mixon], p. 27, lines 4-5).

Neither Trooper Trapp, who was with Mixon in the same van, nor Agent Giganti, listening to the same broadcast over other equipment in her own vehicle, heard the purported response. (RT, p. 194, lines 2-10).

Although it was clear that petitioner's voice did not appear on the videotape, the trial judge prevented defense counsel from impeaching the state troopers' professed voice identifications on the phone calls by comparison with the videotape. (RT [Mixon], p. 34, line 17, through p. 35, line 2).

In its appeal brief to the Fifth Circuit, the government falsely inferred to that court that it did have a recorded response constituting admission on the videotape. (Government's Brief, p. 21). In fact, it has no response whatsoever other than "Huh?"

Testimony also established that the DEA sent 17 lifts of fingerprints, one palmprint, and 81 other cutouts from the marijuana containers to their lab for analysis. None were found to be the petitioner's. (RT, p. 177, lines 1-25).

During cross-examination of the case agent, Giganti, this exchange occurred:

Q [By Mr. Fisher] And how did this deal -- who struck the deal with Mr. Affolter?

A [By DEA Agent Giganti] We were contacted by the New Mexico State Police. They said they had arrested him, and that he was willing to complete the delivery of the marijuana. And when we did some investigating on who was supposed to be -- on Mr. Fassler, who Mr. Affolter said he was bringing the marijuana to, we found out that he had quite a history of other violations; and it was something that we were very interested in. And so, at that point, we decided to follow through with it, and to let Mr. Affolter complete the delivery, so that we could get Mr. Fassler and --

MR. FISHER: Your Honor, I think -- the question, or the answer, is not responsive to the question --

THE COURT: No, it was not responsive --

MR. FISHER: -- And I ask that it be stricken from the record.

THE COURT: -- And it will be stricken, and the jury will be instructed to disregard what the witness said.

Q [By the court] And the witness will be instructed to mind her tongue, or she will have big problems with the court.

(RT, 9/15/87, pp. 156-157).

Except for this stricken statement by Agent Giganti, the jury heard no other testimony whatsoever that the petitioner had conspired or agreed with anyone to commit any crime at all.

There was also brief testimony that the co-defendant Lee had previously provided marijuana to a witness.

During final arguments, the U.S. Attorney argued to the jury that the petitioner "has a predisposition to commit a crime." (RT, 9/16/87, pp. 251-2). When the defense objected, the prosecutor tried to convince the judge that he had used the word "disposition," but without success. (RT, 9/16/87, pp. 253-4). The trial court agreed with

trial counsel that the closing argument could very well be linked with the prejudicial testimony of Agent Giganti, which the court again remarked had been improper, but the court refused to grant a mistrial or to caution the jury to disregard the prosecutor's statement, opining that to do so in a curative instruction would be more harmful than productive. (RT, 9/16/87, p. 255).

Notwithstanding the total clarity of the record in this regard, the Fifth Circuit inexplicably found that the trial court had instructed the jury to disregard the prosecutor's statement and had thus cured the error.

Lee was acquitted on all counts, but the jury convicted the petitioner.

MOTION FOR A NEW TRIAL

On September 29, 1987, the petitioner filed a pro se "Motion for

Rehearing of Motion For a Directed Verdict (Rule 29)" in which he raised for the first time the argument that what Trooper Mixon had testified to at trial was scientifically impossible, and also describing his counsel's failure to properly address this issue before and during trial, and his own interview of the expert witness after the trial. The government responded by asking the District Court to refuse to accept any further pro se pleadings from the petitioner. The court granted that request, and the petitioner's motion was returned to him defiled.

In early November, 1987, after the petitioner had demonstrated his firm intention of creating a proper record, by whatever means available, defense counsel then filed a "Supplemental Motion for New Trial" in which he raised

the same scientific issue and appended the affidavits of two expert witnesses which explained the scientific basis for discrediting the testimony of Trooper Mixon. (Appendix J). The motion was denied.

SENTENCING

During the presentence investigation, the government provided the probation officer with a report which falsely asserted that the petitioner had shot and killed two DEA agents. Although the probation officer investigated the petitioner's denials and determined that the assertions were baseless, he included them in his report to the court upon which he made his sentence recommendation, explaining that even though he knew them to be untrue, he was obliged to present them as fact because the U.S. Attorney had given him that information.

(RT, 11/19/87, p. 33, line 10, through p. 35, line 22).

The trial court determined its sentence upon the basis of the Pre-sentence Investigation Report containing that false information. Although it later ordered that statement stricken from the P.S.I. Report, on November 19th, it did not review the redacted P.S.I. before passing sentence on November 24th.

On November 24, 1987, the petitioner was sentenced to 25 years in the custody of the Attorney General.

On July 14, 1988, the United States Parole Commission informed petitioner that their parole guidelines, for his offense conviction and with his record, called for service of 12-16 months before release on parole, but that because of the severity of the sentence

imposed, he could not be legally paroled in less than 100 months. (Appendix K).

IMPAIRMENT OF THE DEFENSE

The petitioner is a capable and experienced paralegal, who has briefed and prevailed in criminal cases, on behalf of others, in the courts of many jurisdictions, including the Supreme Court of the United States. He had no access to a law library or any other legal materials while in pretrial detention.

The petitioner has personal investigative skills and resources which he was unable to apply while in pretrial detention. There was extensive investigation to be done in New Mexico, Arizona and California which went undone by virtue of the pretrial detention and

the petitioner's lack of sufficient financial resources to hire them done.[3]

The petitioner was under order of the U.S. Magistrate to finance and pay for his own defense. The Magistrate's determination of non-indigency was based upon the petitioner's earnings when not detained. The pretrial detention resulted in the reduction of the petitioner's salary by $2,000 monthly, and imposed substantial additional costs upon the petitioner to maintain contact with his private and professional life.

Petitioner's ability to maintain outside contacts by mail from the place of confinement was severely impaired by

---

[3]A comprehensive and detailed exposition of the investigation and other work needed by the defense appears in the Motion for Continuance filed by the appellant, pro se, in District Court Case No. 87-019 (Cir. No. 87-3915), the record of which has been designated as part of the record in this cause. A copy of the Motion for Continuance is attached hereto as Appendix E.

the failure of the East Baton Rouge Parish Prison to deliver much of his mail to him.

The only effective means of contact with his personal and business ties which the petitioner had while in pre-trial detention was through the use of long distance telephone and private overnight delivery services. Both were very expensive and neither was private.

The petitioner was unable to consult with his attorney on a regular basis and was unable to inform himself as to the progress of the case.

The petitioner was unable to review the physical evidence in the case before trial, particularly the videotape which required access to electronic equipment not available to or permitted the petitioner while confined.

The detention order caused the petitioner to enter and exit the courtroom during trial from the courthouse holding tank, under guard of two or three U.S. Marshals, rather than enter and exit freely as his codefendant Lee was able. The petitioner was unable to freely move about the courtroom to consult with his counsel, as was the codefendant, and was unable to accompany his counsel during recesses in the proceedings.

Much of the preparation and investigation for trial in this cause was of such a nature that it required no special expertise, and could have easily been accomplished by the petitioner. During the weeks immediately prior to trial the petitioner was aware that his counsel had failed in many respects to

prepare for the trial,[4] and he brought that lack of preparation to the court's attention in his pro se Motion for Continuance, (Appendix E), which was filed, considered, and denied in open court on September 15, 1987, immediately prior to the start of the trial. Petitioner was unable to personally rectify

---

[4]The one area where petitioner felt counsel was properly prepared going into trial was in the preparation of an audio-visual expert to testify about the videotape. Counsel had told petitioner in July that he had spent several full days going over the videotape with the expert. However, it quickly became apparent at trial that the expert's trial testimony was confused and unprepared; and during an interview which the petitioner managed to arrange at the jail weeks after the trial he learned that his counsel had never prepared or explained to the expert what the issues for him would be, but had instead given him a completely erroneous understanding of what he would be asked to testify about. Once petitioner learned this, and simply explained the question at hand to the expert, the expert was immediately and readily able to determine that the testimony which had been offered at trial by the Louisiana State Troopers was false and scientifically impossible. He then prepared his own affidavit, and secured the services of a second audio-visual expert who also prepared an affidavit. Both of those affidavits became the basis of the Motion for a New Trial which was filed on November 4, 1987. (Appendix J).

The petitioner was unable to discover the truth about counsel's failure to prepare the expert before trial because he was being detained.

the shortcomings in trial preparation because he was detained.

The petitioner was unable to approach his codefendant to discuss mutual or individual strategies while detained.

The petitioner was unable to seek out Peter Affolter, the person who had set up the petitioner at the government's direction -- but who the government did not present at trial -- because petitioner was detained.

A contemporaneous record of these prejudices to the petitioner's defense exists in the September 15, 1987, Motion for Continuance. (Appendix E).

THE APPEAL

On the appeal of this case to the Fifth Circuit, the government chose to argue a set of facts which differed from its evidence at trial.

At trial, the government's evidence clearly established that there was no recorded admission. On appeal, the government indicated to the circuit court that there was.

On appeal, the petitioner argued that he had been illegally denied standing to challenge the seizure and search on the government's evidence at the suppression hearing. The government represented to the Court of Appeals that the petitioner's argument was based on government witnesses at the trial. Despite the clarity of the record on this point, the circuit court adopted the government's false representation and discounted the petitioner's arguments on that basis.

At trial the government introduced a receipt showing that someone had purchased one sheet of plywood about two

weeks before the crimes charged, and the government witness testified that they had been unable to connect that plywood with the crime. On appeal, the government argued that it had shown such a connection.

In addition to these and other misrepresentations in the government's brief to the Fifth Circuit, which that court adopted as facts in its opinion in this case, there were other serious misstatements in the Circuit Court's opinion as well:

The Fifth Circuit stated that upon arriving at the scene of the crime the petitioner began to unload the marijuana from Affolter's vehicle into the petitioner's truck. There is no such evidence and the videotape shows that statement to be false.

At trial a DEA agent volunteered testimony that the petitioner had a prior record. The jury was instructed to disregard that testimony. During final arguments the prosecutor referred back to the stricken testimony when he told the jury that the petitioner "has a predisposition to commit a crime." The trial court refused to instruct the jury to disregard the prosecutor's argument, holding that to do so would only increase the prejudice. The Fifth Circuit in its opinion acknowledged that this improper interjection of the petitioner's prior record was disturbing, but it found that the error was cured when the trial court gave the jury proper cautionary instruction on both occasions. That finding by the Fifth Circuit belies the record.

ARGUMENT

I. IT IS AN ABROGATION OF THE PRESUMPTION OF INNOCENCE TO CONDITION PRETRIAL RELEASE UPON A GUILTY PLEA.

In this cause the facts make clear, and the United States has stipulated, that the government used the Pretrial Detention Act for plea-bargaining purposes. The government made a variety of offers to the petitioner in exchange for which it would drop the pretrial detention motion. Among them were the request for payment of $200,000-$250,000 to the D.E.A., and the offer by the Magistrate to release the petitioner if he would agree to become an informant for the D.E.A. in Tucson. And, throughout, there was the requirement by the United States Attorney that the petitioner plead guilty to the indictment, first with an exposure at sentencing of 30 years, and later with an exposure of

only 20 years, to secure his release from pretrial detention.[5]

The petitioner, refusing the U.S. Attorney's "Hobson's choice," went to trial sans bail.

18 U.S.C. §3142(j) is directly on point in this case. That statute reads:

> Presumption of Innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Presumption of innocence is defined in Black's Law Dictionary as, "A hallowed principle of criminal law to the effect that the government has the burden of proving every element of a crime beyond a reasonable doubt." Plea bargaining is defined in Black's as, "The process whereby the accused and the prosecutor in a criminal case work out a

---

[5]The petitioner faced an exposure of 60 years by going to trial.

mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty . . ." In this case it required that the petitioner plead guilty to a count with exposure of at least 20 years incarceration.

Thus, by definition, plea bargaining which requires a guilty plea to secure pretrial release on bail is, a fortiori, an abrogation of the presumption of innocence. As such, it constitutes a violation of 18 U.S.C. §3142(j) and a use of the Pretrial Detention Act which is barred by that statute.

II. THE PRETRIAL DETENTION ACT, 18 U.S.C. §3142(e), IS UNCONSTITUTIONAL WHEN APPLIED FOR REASONS OTHER THAN THOSE SPECIFIED BY CONGRESS.

This Court, in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095,

95 L.Ed.2d 697 (987), upheld the pre-trial detention portion of the Bail Reform Act of 1984, 18 U.S.C. §3142(e), as against the facial attack mounted by Salerno. In doing so, Chief Justice Rehnquist wrote that "pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." Salerno at 95 L.Ed.2d 709. He also wrote "that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants" in rejecting the Eighth Amendment argument that the Excessive Bail Clause rendered the Act unconstitutional. Id. at 95 L.Ed.2d 712.

In the case at bar, requiring a plea of guilty to a charge carrying an exposure of 20 or 30 years imprisonment

in exchange for pretrial release is, on its face, to require that petitioner accept punishment as a condition of bail. Moreover, it renders hollow the "primary function of bail": safeguarding the petitioner's right to a fair trial. This petitioner could have secured his release on bail only by waiving his rights to trial and due process by pleading guilty.

Under these conditions, the Pre-trial Detention Act is unconstitutional as it was applied to this petitioner.

Due Process also infers a right to the protection of 18 U.S.C. §3142(j), which preserves petitioner's presumption of innocence. By requiring a guilty plea in order to secure bail, the government unconstitutionally deprived the petitioner of that protection.

III. A CONVICTION MAY NOT STAND WHICH IS BASED SOLELY ON EVIDENCE THE JURY WAS INSTRUCTED TO IGNORE.

During the trial in this cause the government presented no evidence whatsoever that the petitioner had conspired with his codefendant, Lee. The jury acquitted Lee.

During the trial in this case the government presented no evidence whatsoever that the petitioner had conspired with the government agent, Affolter, prior to Affolter's enrollment as an agent/informant, except that the jury heard DEA Agent Giganti volunteer non-responsive testimony to the effect that Affolter had made such a claim, and that the petitioner had a prior criminal record. The trial court instructed the jury not to consider Agent Giganti's remarks, and remonstrated her for her comments.

During final argument, the prosecutor reminded the jury of Giganti's stricken testimony by referring to the petitioner's "predisposition" to commit the crimes charged. Although the trial court chastised the prosecutor outside the presence of the jury, he refused to instruct the jury to disregard the prosecutor's comments, observing that to do so would only increase the prejudice to petitioner.

Because the only evidence of any purported conspiracy between the petitioner and Affolter was the stricken testimony by Agent Giganti, there is no evidence in the record upon which these convictions may stand.

Although the opinion below recites a litany of "facts" which would appear to constitute other evidence, such as a recitation that the petitioner was

removing the boxes of marijuana from Affolter's vehicle and placing them into his own truck, no such evidence exists in the record of this case. Nor is the substance of those recitations true.[6]

Because there is no evidence in this record to support the alleged conspiracy, except the stricken testimony, the convictions should be reversed.

IV. IT WAS A DENIAL OF DUE PROCESS TO REFUSE WITHOUT HEARING A MOTION FOR NEW TRIAL WHICH VERY SUBSTANTIALLY IMPEACHED THE HEART OF THE GOVERNMENT'S CASE.

The essence of this appeal is a 30 second incident in Baton Rouge, Louisiana, fully captured on videotape.

After causing their agent, Peter Affolter, to make telephone calls

---

[6]The evidence--the videotape--shows that the acquitted codefendant Lee was putting the marijuana into his own (Lee's) truck.

designed to bring the petitioner to Baton Rouge to assist Affolter with car troubles, the police instructed Affolter, who was hauling large cartons full of marijuana, to ask petitioner a question intended to elicit an admission that petitioner was the owner of the cartons and knew their contents.

When petitioner and his acquitted codefendant Lee arrived at the scene, petitioner immediately investigated the mechanical problem while Lee began to unload the cartons into Lee's truck.

As the videorecording clearly shows, Affolter then asked petitioner, in essence, "Do you have marijuana in the boxes?" Petitioner clearly responded "Huh?" Not having received the answer the police wanted, Affolter then repeated his question verbatim. Petitioner's answer to the repeated

question ("How should I know?")[7] does not appear on the videorecording.

At trial three police officers testified. Two were state troopers who monitored the incident from their surveillance van 100 yards away. One, Mixon, was operating the videocamera while both heard the broadcast from a microphone on Affolter as it was broadcast in their van. The third officer was a DEA agent who was listening to the same broadcast over separate equipment in her own car. Of the three, only Mixon claims to have heard the petitioner make "an affirmative response."

On November 4, 1987, the defense filed a "Supplemental Motion for New Trial," requesting an evidentiary

---

[7]Although petitioner did not testify at trial, he did repeat his answer to the second question at allocution.

hearing to examine the accuracy of Trooper Mixon's explanation at trial as to how he was able to hear "an affirmative response" which did not appear on the videotaped recording.

The essence of Mixon's testimony was that he was able to hear the conversation between petitioner and Affolter over a "broadcast" device in his surveillance van before that conversation was recorded by the videocassette recorder, and that "RF interference" from the airconditioning unit in his van interfered with the recording of petitioner's alleged "affirmative response" at the recording head of the machine. This testimony came as a surprise to the defense, which considered the police videotape to be a faithful and accurate recording of what had transpired.

Integral to petitioner's Supplemental Motion for New Trial were affidavits from two experts in the field of audiovisual recording and remote and mobile equipment. These experts stated that:

1) In their opinion, the background noise audible on the videotape entered the system in the broadcast distance between Affolter's wireless microphone and the receiver in the surveillance van.

2) The locale of the recording is an area of very heavy microwave activity, which would cause such background noise.

3) The background noise is consistent throughout the recording and is not unique to the spot in the tape where Fassler's alleged "affirmative response" would have appeared.

4) Electronic interference of the type heard on the videotape is almost certain to have been received through the radio receiving device in the van, and not through the wires connecting that receiver with the videorecorder.

5) The noise from an improperly installed or improperly filtered power supply in an air conditioning system would more readily attack an "in use" receiver than an interconnecting wire (as stated by Trooper Mixon). Further, had this interference been strong enough to penetrate a wire in the manner described by Mixon, it would almost certainly have penetrated the wire to the videorecorder as well, and would be seen as interference in the video portion of the recording, but no such interference appears in the video portion of this tape.

6) The audio signals transmitted by Affolter's wireless microphone were recorded exactly as they were received on the antenna of the receiver apparatus.

7) Trooper Mixon's assertions "are highly improbable if not impossible."

The opinions of the experts are consistent with the testimony of DEA Agent Giganti, who failed to hear the alleged response although she was in another vehicle listening over a monitor

in that vehicle -- certainly free of interference from the air conditioning unit in Mixon's van.

The opinions of the experts are also consistent with the absence of testimony to support Mixon from Trooper Trapp, who was in the same van with Mixon listening to the same conversation at the same time over the same equipment. Nor was Trooper Trapp preoccupied with a videocamera during that time, as was Trooper Mixon.

And the opinions of the experts are also consistent with the videotape itself, which records everything, from Affolter's question to petitioner immediately before the alleged "affirmative response" to the "State Troopers! Freeze!" which is heard a scant second later.

The opinions of the experts, insofar as they impeach Trooper Mixon's credibility, are also consistent with the evidence as to his lack of credibility: Mixon had already testified that he identified the voice of the second party to the telephone conversations as the petitioner's, by comparing the voice on the cassette tape recording of the phone calls with the petitioner's voice on the videotape, and found it to be the same, (RT [Mixon], p. 51, lines 4-12), despite the absence of the petitioner's voice from the videotape. (His explanation of that very absence is what this entire argument is about.)

If the trial court felt that there existed a reasonable possibility that the jury believed Mixon's assertion as to the alleged "affirmative response," then a hearing should have been granted

on the Supplemental Motion for New Trial.

In evaluating Mixon's testimony at such a hearing, the questions before the bar would not only be that of credibility, but also those of improbability, impossibility, prejudice, perjury, improper disclosure, and the lack of a fair trial.

By refusing a hearing, which could have put to rest any dispute as to the veracity of Trooper Mixon, as well as to the scientific plausibility of his "explanation," the trial court denied the petitioner substantial due process. This denial also aggravated the prejudice caused by the wrongful pretrial detention, which had precluded the petitioner from making any personal investigation of the surveillance van after Mixon had testified at trial, and

after the petitioner had already advised the trial court, in his Motion for Continuance, that his trial counsel was failing or refusing to conduct the necessary investigations in this case.

V. AN APPELLATE COURT REVIEW WHICH FAILS TO CONSULT THE RECORD TO VERIFY THE EXISTENCE OF "EVIDENCE" ARGUED BY THE PROSECUTOR BUT DENIED BY THE PETITIONER (AND ABSENT FROM THE RECORD) DOES NOT SATISFY DUE PROCESS.

The government's brief on appeal in the Fifth Circuit strayed from the factual record in its virtual entirety. Where the petitioner offered as proof of his Fourth Amendment standing only evidence adduced at the suppression hearing, the government falsely represented that he was offering evidence from the trial itself. Where the government offered no evidence whatsoever at trial to show a conspiracy between the petitioner and the

government's agent Affolter, in its brief the government argued, without citation, that it had presented overwhelming evidence. Where the government's evidence at trial was that it had failed in its effort to secure a videotaped admission by the petitioner, the government's brief on appeal argued that such an admission existed. These and similar departures from the truth constituted the whole of the government's argument on appeal in the Fifth Circuit.

The decision of the Court of Appeals is based on the facts as recited in the government's brief, which the Fifth Circuit repeated in its opinion. Not one statement of incriminatory fact in the Fifth Circuit decision is supported by the record; to the contrary, the record refutes them all.

Although the government's brief was unable to cite the record on appeal in support of its version of the "facts," the petitioner's reply brief in the Circuit very carefully and precisely referenced the record in refutation of every significant point. Therefore this was not a case of the petitioner failing to carry his burden of proof in the court below. Rather, this is quite clearly a case of the Court of Appeals having failed to refer to the record to resolve the factual truths of the case before it. It is inconceivable that the many misstatements in that court's opinion could be the result of any difference of opinion or of interpretation of the evidence. In this case the evidence argued by the government on appeal, and restated by the Court of

Appeals as the basis for its decision, simply does not exist.

By failing in its responsibility to consult the record in order to fairly and accurately resolve the factual issues in this appeal, the Fifth Circuit has failed to provide the petitioner with due process of law, and should be reversed.

VI. A DEFENDANT IS NOT BARRED FROM USING THE GOVERNMENT'S EVIDENCE AT THE SUPPRESSION HEARING TO ESTABLISH HIS FOURTH AMENDMENT STANDING.

At the suppression hearing in this cause the government put on officers who testified that the petitioner was the owner of the marijuana at issue and that Affolter was acting as his agent at the time of the seizure and search. The government also stipulated that the petitioner was the lessee of the vehicle which Affolter was driving, and gave

sufficient evidence of the careful packaging of the marijuana to establish an expectation of privacy.

The petitioner did not get to put on his own evidence as to standing because the trial court abruptly cancelled the second day of the suppression hearing for which he was the only named witness. Nevertheless, there was enough evidence presented by the government's witnesses to establish the petitioner's standing.

On appeal, the government argued that the petitioner could not rely upon the government's evidence, but could only rely upon his own--which he did not present. In order to provide the appearance of a legal basis for this position, the government also falsely represented to the Fifth Circuit that the evidence upon which the petitioner relied had been adduced at the trial, rather than at the suppression hearing. Despite vigorous defense protestations

to the contrary, the Court of Appeals apparently accepted the government's misstatements without making its own independent investigation of the record, and upheld the denial of standing based upon the government's false representation that the petitioner was arguing from trial evidence.

VII. THE PETITIONER WAS DENIED THE RIGHT TO TESTIFY ON HIS OWN BEHALF.

A suppression hearing was held on July 31, 1987. At that hearing police officers testified, and the hearing was then continued to a later date, at which the petitioner, and possibly others, would testify for the defense.

However, the continuation of the hearing was cancelled at the last moment and the petitioner was not allowed to testify on his own behalf.

During the detention hearing on June 12, 1987, the U.S. Magistrate refused to allow the petitioner to testify in a manner specifically provided by the pretrial detention

statutes unless he would also take the stand and subject himself to unlimited cross-examination on other issues.

Each of these instances was a denial of the petitioner's right to testify on his own behalf.

VIII. A CONVICTION WHICH IS SUBSTANTIALLY FACILITATED THROUGH DELIBERATE IMPROPER USE OF THE PRETRIAL ACT CANNOT STAND.

Much as the Exclusionary Rule to redress violations of Fourth Amendment rights has evolved to deter lawless conduct by federal officers (Rea v. United States, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292), and to close the doors of the federal courts to any use of evidence unconstitutionally obtained, (Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437), sound public policy demands that the court prohibit governmental abrogation of the presumption of innocence by denying the prosecution the fruit of its deliberate wrongdoing.

In this case the petitioner was subjected to a detention hearing in which he was denied his statutory rights to present evidence on his own behalf in the manner prescribed by law. (Fassler v. United States, 858 F.2d 1016, n.5). In this case the same magistrate who conducted that hearing informed the petitioner's defense counsel that he would grant pretrial release if the petitioner would agree to become an undercover informant for the DEA.

In this case the petitioner was offered pretrial release in exchange for a guilty plea.

In this case the petitioner was offered pretrial release in exchange for a substantial cash payment to the DEA.

In this case the government stipulates that it used the Pretrial Detention Act for plea-bargaining purposes.

This petitioner was forced to trial without the benefits of the presumption of innocence, and suffering from the

several disabilities which were enunciated in advance of trial in the Motion for Continuance (Appendix E).

In this case the government's evidence at trial was underwhelming, feeble and false on its face.[8] A fair review of this record shows that the petitioner was almost certainly convicted by reason of the stricken testimony of a DEA agent who volunteered his 20-year-old prior record, and by reason of the several disabilities imposed upon him by the pretrial detention.

Had this petitioner been able to participate freely in his own defense, he would have been able to counter the false testimony of the state troopers when it was offered. Had he been free to do such simple things as enter and

---

[8]I.e., Trooper Mixon's claim that he heard an admission which is absent from the videorecording; the testimony by both Mixon and Trapp that they identified the petitioner as the second party to the phone calls by comparing his voice on those tapes to his voice on the videotape--even though his voice does not appear on the videotape.

exit the courtroom with his counsel (as was his codefendant), instead of coming and going under armed guard, he may well have been acquitted (as was his codefendant).

It is just such disabilities as these which the courts have historically had in mind when discussing the reasons for, and the importance of, bail for defendants in criminal cases. To now say that this most vital right can be subverted by the government, with full immunity for its misconduct, makes a mockery of the law.

A conviction which is the proximate result of illegal pretrial detention must be set aside, and this petitioner must be set free.

CONCLUSION

This is a case in which the government began by securing pretrial detention against the petitioner in order to force him to plead guilty. The government offered pretrial liberty in exchange for a guilty plea, in exchange

for a large cash payment, and, from the U.S. Magistrate himself, in exchange for the petitioner's agreement to become a confidential informant for the DEA.

When the petitioner refused to accept any of the government's offers for his freedom, the government proceeded to produce evidence at trial which was false on its face. It offered the testimony of two state troopers who claimed that they identified the petitioner as the second party to phone calls by comparing the voice on the recorded calls to petitioner's voice on a videorecording--even though petitioner's voice does not appear on the videorecording. It offered the testimony of one state trooper that he had heard the petitioner give "an affirmative response" to an incriminating question, despite the clear absence of that response on the videorecording of the incident. And it offered the jury the inadmissable evidence of the petitioner's prior record, both from a

DEA agent and in the prosecutor's final argument.

On appeal the prosecution presented a brief which totally misrepresented the record, even to the point of arguing that it did have a recorded admission in evidence.

If ever there was a case of governmental misconduct to obtain a conviction, it is difficult to conceive of one with particulars more flagrant than these.

This injustice must be cured, and this Court should issue a writ of certiorari to the Fifth Circuit Court of Appeals to that end.

RESPECTFULLY SUBMITTED this 23rd day of June, 1989.

Lawrence Fassler
in propria persona

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANTON BLOOM, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has mailed two copies of the following documents to the United States Attorney for the Middle District of Louisiana, 352 Florida Street, Baton Rouge, Louisiana, 70801, and has forwarded by mail, three copies of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 23rd day of June, 1989.

Stanton Bloom
STANTON BLOOM

SUBSCRIBED AND SWORN TO before me this 23rd day of June, 1989, by STANTON BLOOM.

Mary C. Kinney
Notary Public

My Commission expires:

10-12-92

(2)

88-2121

Supreme Court, U.S.
FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
02061-095
Box 1700
Black Canyon Stage 1
Phoenix, Arizona 85029

Supreme Court, U.S.
FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

BEST AVAILABLE COPY

No. _____

==========

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
02061-095
Box 1700
Black Canyon Stage 1
Phoenix, Arizona 85029

==========

INDEX
TO APPENDICES

A Fifth Circuit Opinion dated December 28, 1988

B Order Denying Rehearing dated April 28, 1989

C Transcript Excerpts from June 12, 1987 hearing

D Transcript Excerpts from September 3, 1987 hearing

E Motion for Continuance dated September 15, 1987

F Affidavit re Petition for Habeas Corpus dated September 16, 1987

G Petition for Habeas Corpus filed in District Court September 10, 1987

H District Court Order Denying Habeas Corpus dated September 30, 1987

I District Court Order Denying Rehearing dated October 1987

J Expert Affidavits Regarding Videotape

K Parole Commission Notice of Action dated July 14, 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3915
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

LAWRENCE FASSLER

Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
LOUISIANA
(CR-87-19-A)

(December 28, 1988)

Before GEE, WILLIAMS and

HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:[1]

The Defendant, Lawrence Fassler, was indicted for conspiring to possess marijuana with the intent to distribute and with possessing marijuana with the intent to distribute. A jury convicted him on both counts. On appeal, Fassler alleges the existence of numerous errors in the trial court proceeding which, he contends, require reversal of his convictions. After reviewing the record in this case, we conclude that Fassler's allegations are with-

---

[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

out merit. Consequently, we affirm his convictions.

At the outset, Fassler contends that the evidence at trial was insufficient to sustain the jury's verdict on either count of the indictment. Specifically Fassler contends that the conspiracy conviction cannot be sustained because his indicted alleged co-conspirator was acquitted and that the possession conviction cannot stand because the government failed to prove that Fassler exercised dominion and control over the marijuana. Because this challenge is to the sufficiency of the evidence we must view the evidence in the light most favorable to the verdict, drawing all reasonable inferences which support the

verdict. United States v. Mortazavi, 702 F.2d 526 (5th Cir. 1983). Applying this standard, we must affirm the jury's verdict unless, under the circumstances, a "rational trier of the fact could [not] have found the essential elements of the crime beyond a reasonable doubt. . . ." United States v. Brown, 699 F.2d 704, 710 (5th Cir. 1983) citations omitted.

The evidence presented at trial, viewed in the light most favorable to the verdict, establishes the following facts: On May 27, 1987, New Mexico state police were conducting a routine roadblock to check driver's licenses. The officers stopped a station wagon driven by Peter

Affolter. While speaking with Affolter, one of the officers detected the odor of unburned marijuana inside Affolter's vehicle. The officer also observed a number of cardboard cartons in the cargo area of the vehicle. Upon request, Affolter provided the officers with a rental agreement for the station wagon. The agreement stated that the vehicle had been rented by "L. Fassler", Affolter signed the consent to search form authorizing the officers to search the vehicle for marijuana. The officers found approximately 162 pounds of marijuana concealed inside the cartons in the vehicle. The cartons were lined with plywood and contained a inner box within which the mari-

juana, wrapped in bubble paper, was concealed.

Affolter was interviewed by the New Mexico police and agreed to cooperate with the police officers. The New Mexico police drove the marijuana to Louisiana and contacted the Louisiana police. At the direction of the police Affolter placed two calls to an individual identified by police as Fassler. In the second call Affolter told Fassler that he was having mechanical trouble and could not get the vehicle to New Orleans. Affolter also told Fassler that the car was smelling and that he didn't want any body running around the car. Fassler agreed to meet Affolter in Baton Rouge.

When Fassler arrived in Baton Rouge he was accompanied by his co-defendant, Charles Lee. The two men were photographed by police who were inside a surveillance vehicle. The officers were also listening, via a body wire placed on Affolter, to the conversation and taping the conversation. At trial one of the officers testified that he heard Fassler respond affirmatively that the vehicle contained "pot". None of the other officers present testified to having heard this remark. The quality of the tape recording was very poor and Fassler disputes that the tape contains an affirmative response. Fassler and Lee were arrested at this time. On July 13, 1987, in response to a bill

of particulars filed by Fassler's counsel, Fassler was notified that Affolter was an unindicted co-conspirator in the case.

Following the arrest of Fassler and Lee the government seized Fassler's briefcase containing approximately $37,000 in cash and a receipt which was probably for two sheets of plywood similar to those used in the cartons containing the marijuana. The government also introduced evidence that Fassler had flown from Tucson to Phoenix on May 25, 1987, the same day the station wagon was rented in Phoenix, and then to Detroit, Michigan, and on to New Orleans all between May 25th and May 28th. On the latter two flights

Fassler used the name "Paul Anderson."

Viewing the evidence in the light most favorable to the guilty verdict, we are unable to conclude that no rational trier of fact could have found Fassler guilty beyond a reasonable doubt on the conspiracy charge. The evidence linking Fassler to the conspiracy was circumstantial. Circumstantial evidence may be used, however, to show the existence of a conspiracy. United States v. Cardenas Alvarado, 806 F.2d 566, 570 (5th Cir. 1986). Additionally, while the government concedes that a conspiracy cannot be found between one defendant and a government informant, see United States v. Mantas Mejia, 824 F.2d

360, 367 (5th Cir. 1987), there is sufficient evidence in this case to support the government's contention that Fassler conspired with Affolter before Affolter became a government informant. The fact that Affolter later made the transformation to government informant does not relieve Fassler of liability for the conspiracy that occurred before then. Fassler's contention that the conspiracy verdict was improper because his co-defendant was acquitted is, therefore, without merit.

Fassler's contention that the evidence was insufficient to sustain the possession conviction is also without merit. "Proof of actual possession is not necessary to

sustain . . . [Fassler's] conviction . . . since constructive possession of a 'controlled substance' violates . . . [federal law]." United States v. Jackson, 588 F.2d 1046, 1056 (5th Cir. 1979). The evidence established that the vehicle containing the marijuana had been rented to "L. Fassler." The receipt established that Fassler had purchased plywood similar to that lining the cartons which contained the marijuana. An officer testified that Fassler responded affirmatively when asked if the vehicle contained marijuana.[2] Finally, at the time of

---

[2]Fassler vehemently challenges the truthfulness of this testimony. The jury, however, apparently believed the officer. Under these circumstances we will not reappraise the credibility of a witness. See Olgin v. Darnell, 664 F.2d 107 (5th

his arrest Fassler and Lee were transferring the marijuana to Fassler's vehicle. "Taken together, in law, unlike plane geometry, the whole may be greater than the mere sum of parts. The combined weight of these facts as a whole is such that a jury could reasonably conclude that . . . [Fassler possessed the marijuana]." United States v. DeLeon, 641 F.2d 330 (5th Cir. 1981). This evidence is therefore sufficient to sustain the jury's verdict in this case.

Fassler also contends that the district court erred in ruling that he lacked standing to challenge the search of the vehicle and cartons

---

Cir. 1981).

containing the marijuana. "The threshold inquiry in a 4th Amendment challenge is whether the challenger has a legitimate expectation of privacy in the invaded place." Untied States v. Glasgow, 658 F.2d 1036, 1044 (5th Cir. 1981). "The burden of persuasion on this issue is placed squarely on the movant." United States v. Gomez, 770 F.2d 251 (5th Cir. 1985).

In this case the only evidence presented at the suppression hearing regarding Fassler's interest in the vehicle was the government's stipulation that the rental agreement was issued in Fassler's name and that he loaned the vehicle to Affolter. As we have noted, however, ownership or leasehold interest will not confer

standing to challenge a search unless "accompanied by a cognizable privacy interest in the place or thing searched." United States v. Dyar, 574 F.2d 1385, 1390 (5th Cir. 1978). Since Fassler failed to present any evidence that his lease-hold interest in the vehicle was accompanied by a "cognizable privacy interest," the district court correctly ruled that he lacked standing to challenge the search of the vehicle.

Fassler also failed to meet his burden of persuasion regarding his standing to challenge the search of the cartons containing the mari-juana. At the suppression hearing Fassler offered testimony regarding the method used to package the mari-

juana, arguing that this evidenced a legitimate expectation of privacy in the cartons. He did not, however, introduce any evidence that he was involved in packing the cartons or had any possessory interest in the cartons. Rather, Fassler attempts to rely on the governments trial evidence regarding his interest in the cartons to establish his standing to challenge the search of the cartons. This he cannot do. A defendant's burden of persuasion on a standing issue, "[l]ike all grounds offered in support of suppression motions, . . . must be met prior to trial . . ." United States v. Gomez, supra at 253. While Fassler may have presented sufficient evidence to allow the

court to find that someone had a legitimate privacy interest in the cartons, he did not present any evidence that he had such a privacy interest. Under these circumstances the district court properly ruled that Fassler lacked standing to challenge the search of the cartons.

Additionally Fassler contends that certain remarks made by a government witness and the prosecutor during the course of the trial constituted plain error and that the district court should have granted a mistrial. The first remark was made by D.E.A. special agent Gigante who, in response to a series of questions regarding which agency made a deal with Affolter, stated that Fassler had "quite a history of other viola-

tions." The second remark was made by the prosecutor during closing arguments. He stated that "it is a perfectly legitimate law enforcement technique to try to lure a person, who has a predisposition to commit a crime . . . to the place where you want to bust them." Fassler's counsel objected to both statements. In both cases the court admonished the person making the statement and instructed the jury to disregard the remark.

Fassler cites United States v. Escobar, 674 F.2d 469 (5th Cir. 1982) in support of his proposition that such an improper reference to a defendant's prior criminal record mandates a reversal of the defendant's conviction. At first blush

Fassler's reliance on Escobar appears to be well placed. The agent in Escobar, like Agent Gigante, improperly testified that the defendant had a prior record. In reversing the defendant's conviction in Escobar we stated:

> The prejudicial impact of the officer's statement in the case at hand is without question. Although it was acknowledged that . . . [the defendant] did indeed have a prior record, there was no mention of the specific offense he committed. This statement coupled with the allegation int he same sentence that . . . [the defendant] was "a suspected narcotics smuggler," would no doubt lead the jury to believe that the current charges against him were merely the most recent in a series of drug related offenses. . . . Under the circumstances of this case, we conclude that the admission of the officer's testimony was

> plain error necessitating reversal of the defendant's conviction and remand for a new trial. Id. at 475.

The flaw in Fassler's reliance on Escobar is that the circumstances of the officer's testimony int hat case are not the same as the circumstances in this case. In Escobar, as in this case, defense counsel objected to the improper evidence. In Escobar, however, the court permitted the introduction of the evidence and no limiting instruction was given. By contrast, in this case the officer's testimony was stricken and the jury was instructed to disregard that testimony.

> "To require a new trial, . . . [a] significant possibility must exist that . . . the statement had a substantial impact on the verdict of the jury."

United States v. Perez-Robles, 718 F.2d 700 (5th Cir. 1983).

In light of the court's instruction to the jury we are unable to conclude that the statements had a substantial impact on the jury's verdict. Under these circumstances the remarks were not so clearly prejudicial that a reversal of Fassler's convictions is warranted.

Fassler's raises numerous other issues on appeal. After reviewing these issues we find them to be similarly without merit. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3915

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

LAWRENCE FASSLER

Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
LOUISIANA

ON PETITION FOR REHEARING
(April 28, 1989)

Before GEE, WILLIAMS and

HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX C

Transcript excerpts from June 12, 1987 hearing

Testimony of D.E.A. Agent Gigante: (At transcript p. 3).

Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?

A Yes, Sir.

Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?

A Yes, Sir, he was.

Q Would you tell the Court what he was indicted for, please?

A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.

Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?

A Marijuana.

(Hearing Transcript, p. 4):

Q Do you know approximately how much?

A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

Q In doing your background check on Mr. Fassler, were you

able to determine if he has any prior criminal convictions?

A Yes, he has a murder conviction from 1971 and a federal drug conviction and a state drug conviction.

Q Have you been able to obtain any information whether Mr. Fassler is currently on bond or on parole or probation for any other drug offense other than the one he's now under arrest for?

A Yes, Sir, when we arrested him he was out on bond for

another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport that was found to contain marijuana.

Q During your investigation have you been able to determine

whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also involved in heroin dealings.

Q And would you relate to the Court what information --

or why that information -- what the information is that has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in

Tucson that was received in -- at the New Orleans Airport

(Pages 6 and 7):

and found to contain heroin.[2]

MR. MYERS: I have no further questions, your Honor.

THE COURT: Cross-examination.

(Page 8):

Q You also indicated that there was some -- you had some

---

[2]On June 11, 1987, the previous day, the defendant had learned from Tucson D.E.A. agents that this incident had occurred two years before, and that someone other than the defendant had been identified as having made the shipment.

knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.

A Yes.

Q Okay. Do you know how much that involved?

A I was told a suitcase full. I'm --

Q I'm sorry.

A I was told a suitcase full. I -- I do not know the exact amount.

Q Okay. You don't know anything about that?

A No, I do not.

APPENDIX D

Transcript excerpts from September 3, 1987 hearing (page 8, lines 12-18)

MR. MYERS: We will -- We will stipulate that during negotiations before Mr. Fassler -- before the detention hearing, that the government represented to Mr. Fassler and his lawyer that if he would agree to plead guilty to the terms of our offer and work with the agents, then we would consider recommending that he be released on a bond. I'll stipulate to that.

APPENDIX E

MOTION FOR CONTINUANCE

Filed September 15, 1987 in open court

This is a typewritten copy of the Motion for Continuance filed in court of Sept. 15th, 1987. The original as filed was handwritten, and this copy is typed from a handwritten copy of the original. It is a faithful reproduction of the original as filed.

The AFFIDAVIT which follows, dated Sept. 15th, 1987, was also filed as a handwritten original, and this typed copy is made from a handwritten copy of that original.

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT
OF LOUISIANA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CASE NO. CRIM. 87-019
vs.	)	
LAWRENCE ALLEN FASSLER,	)	MOTION FOR CONTINUANCE
Defendant.	)	

COMES NOW the Defendant, Lawrence Allen Fassler, and moves the Court for a continuance of 90 days in the trial date set in this matter, for the reasons set forth below:

I) The present trial date was set on July 31, 1987. At that time the Court indicated that if a continuance would be required the

Court would entertain such motion at a subsequent date. Also at that time the Petitioner believed and realized that whether or not he continued to be incarcerated it would be impossible to properly prepare and investigate this case in order to meet the requirements of due process by the first regularly scheduled trial date, and communicated that belief to this counsel.

In response to Petitioner's concern about a continuance, his counsel assured him that a continuance would be obtained at an appropriate time. Later--on August 13, 1987--and thereafter, Petitioner's attorney continuously assured Petitioner that the Prosecutor would be unavailable, due

to resignation, at the first regularly scheduled trial date, and that a continuance would necessarily be set by the parties.

Petitioner relied on the representations of counsel because while he has diligently tried to prepare and investigate the case he has realized at all times that the investigation would not be accomplished in time.

On Sept. 3rd, for the first time, and to Petitioner's surprise, counsel informed the Petitioner that it might become difficult to obtain a continuance. Petitioner's counsel then suggested that Petitioner accept a plea bargain agreement the Petitioner had rejected three months previously, and continues to reject.

Through Sept. 3rd Petitioner and his counsel have had no discussions as to trial strategy, or preparations for trial, whatsoever, and Petitioner is of the opinion that counsel is woefully unprepared for trial.

On Sept. 8th, 1987, the first time Petitioner saw counsel subsequent to Sept. 3rd, he discussed the above with counsel and insisted that counsel seek a continuance. Counsel replied by informing Petitioner that he would be out of the jurisdiction and that he would contact Petitioner on Sept. 11th to further discuss the matter.

Although Petitioner has continually inquired as to the continuance with his counsel, Petitioner has now

become duly concerned that any further delay in filing the Motion for Continuance would prejudice the parties and the Court, advised in the premises. Petitioner therefore feels it incumbent to immediately inform the Court of some of the many material reasons why a continuance should be granted.

II) Petitioner expects to go to trial in this matter, and believes that he has a meritorious defense at trial. That defense complicated and difficult, and requires extensive investigation and preparation which has not yet been accomplished. Petitioner needs the time herein requested to advance that defense.

Among the many specific items which require further investigation and preparation are the following:

A. Background investigation of Peter Affolter, expected to be the key prosecution witness. Among specific items about Mr. Affolter still requiring investigation are:

1. His background and prior criminal history in Switzerland.

2. His background and prior criminal history in South America.

3. His landholdings in South America, including Brazil, Columbia and Bolivia.

4. His prior criminal history engaged in the smuggling of cocaine from South America to

Switzerland through the United States.

5. Outstanding criminal cases against Mr. Affolter and his wife at this time.

B. Background investigation of Allen Haysbert, suspected of being an undisclosed confidential informant in this cause. Specific matter of interest include:

1. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1985, in San Mateo County, California.

2. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1986, in San Mateo County, California.

3. Circumstances and disposition of drug charges brought

against Mr. Haysbert in 1987, in Tucson, Arizona, directly related to this case.

C. Circumstances and specifics as to the search of a station wagon in New Mexico which led to this indictment. This search is believed to have been a pretextual stop arranged by the D.E.A. in such a manner as to allow them to deny involvement. Among specific reasons for this belief are the following:

1. Information from one "Tracey" Doe in Tucson, Arizona who had specific knowledge of the details of Petitioner's arrest on the date of that arrest, including information pertaining to events preceding the arrest, and who is

reputed to be the close companion of a D.E.A. Agent in Tucson.

2. The circumstances of the search, which are consistent with other such searches in New Mexico generally believed by criminal law professionals in Arizona to be a continuing series of pretextual stops.

3. Statements made to the Petitioner by D.E.A. Agents in this case when he suggested to them that the search was not what it seemed, including admissions the D.E.A. does engage in such activity and including specifics of other such activity by the D.E.A.

4. Statements made by a New Mexico State Trooper in this Court on July 31, 1987, which are

strongly and advisedly believed by the Petitioner to be contrary to the true facts.

5. Information developed by private Investigator Victor Bouchet which suggests D.E.A. involvement in this case in Tucson, Arizona, prior to the search in New Mexico.

D. Prior statements of Peter Affolter both D.E.A. and New Mexico police, which are believed to exist and to be "Brady" material which has not, but should have, been disclosed to the defense by the government.

III) Many, if not most, of the matters listed above, as well as other matters not mentioned herein, could have, and would have, been investigated by the Petitioner

personally had he not been incarcerated during the past 3-1/2 months pursuant to the U.S. Attorney's misuse of the Federal Pre-Trial Detention Act as a Plea-Bargaining weapon. (A fact stipulated by the U.S. Attorney on Sept. 3, 1987, before the Court.)

However, because Petitioner has been incarcerated, because his counsel has not conducted appropriate investigations, and because until the last few days Petitioner believed that the trial date in this case would be continued, the government's misuse of the Pretrial Detention Act has precluded Petitioner from accomplishing such investigation.

IV) Since the latter part of July, 1987, Petitioner's present counsel has informed the Petitioner that he needed additional funds to pursue investigation and discovery in this cause. Among specific items mentioned by counsel as requiring such additional monies are the dispatching of investigators or personal travel by counsel to New Mexico, the subpoenaing of witnesses, the service of process, and the general and extensive investigation suggested by matters discussed earlier in this Motion.

Because of Petitioner's continued pre-trial detention he has been unable to earn and to provide counsel with such funds, and his financial difficulty had prevented

the defense from hiring the investigation and discovery herein discussed others.

V) On May 28th and 29th, 1987, D.E.A. Agents representing themselves to be speaking with the authority of the U.S. Attorney, assured the Petitioner that the U.S. Attorney would not pursue the pre-trial detention motion in this case and assured the Petitioner that he would be released on bail after the expiration of the ten day period imposed by the Magistrate. At that time they also made certain demands and representations to the Defendant which induced certain inactions by the Petitioner that have resulted in substantial financial losses to the Petitioner, denying his access to,

and the benefit of, a sum estimated at more than $45,000 which would otherwise have been available to him for use in his defense. U.S. v. Harvey, 814 F.2d 905.

The government made it appear for a period of time after May 29th that the representations, assurances, and demands made by the D.E.A. Agents at that time continued in effect, thereby effectively depriving the Petitioner of the financial resources which would have otherwise been available to his defense.

VI) Additional and further items which should also be investigated include the following:

A. Further investigation and interviews, or attempts to inter-

view, many and varied New Mexico Police Officers and other non-police witnesses and parties to other searches in New Mexico similar in circumstance to the search in this case, to support the contention that pretextual stops and arrests in New Mexico are common and to support the contention that the stop and search in this case was a sham and a pretext.

B. Further investigation of Peter Affolter and other witnesses in respect to any deals, plea bargains, or other gratuities given to each or any of them in respect to this and any other case. This information is potentially vital to my defense for the possible defenses of entrapment, lack of knowledge,

frame-up, or mistake of fact, as well as others. To deprive the defendant of the potential investigation of these matters would deprive the defendant of due process of law.

VII) A Severance Motion filed on behalf of co-defendant Charles Lee has been pending before this Court for more than a month. The disposition of that Motion has a potentially very important impact on my defense and may materially affect the nature of that defense.

Until it is known whether Mr. Lee is to be a co-defendant at trial it is impossible to plan a definite defense. At this time the defense does not know if Mr. Lee will be available as a friendly witness, or,

indeed, a potentially hostile witness. The ultimate resolution of this question is vitally important to the final defense strategy in this case.

VIII) On Sept. 8, 1987, the U.S. Attorney filed allegations of prior convictions for sentence enhancement in this matter. It is now additionally necessary that the Petitioner gather and prepare such materials as may be necessary to refute these newly filed allegations.

It is also now advisable and desired by the Petitioner that he investigate the ramifications of this new filing by the U.S. Attorney and weigh its impact upon the defense and defense strategy in this cause; which he may well be unable

to adequately do in the short time remaining before the first scheduled date for trial.

IX) On Sept. 9, 1987, just minutes before was to mail the foregoing, I was advised by counsel, by messenger, that the principal witness, Mr. Affolter, could not be located and that the government would likely not be ready to proceed to trial on Sept. 15th, and that counsel would see me on Sept. 11th.

On Sept. 11th and 12th and 14th counsel advised me of new items of evidence was being advised of by the Prosecution on a daily basis, and on Sept. 14th he also advised me that he was going to seek a continuance and believed that he would get it without filing this Motion, which I

suggested he append to his own. At 6:30 P.M. on Sept. 14th I learned that his Motion had been denied.

For these reasons this Motion is being filed at this late date.

X) In light of the unexpected unavailability of Mr. Affolter at trial, it is now the intent and desire of the Petitioner to seek to locate Mr. Affolter for use as a defense witness, and/or to impeach other prosecution witnesses.

Petitioner does have reason to believe, and believes, that he might succeed in locating Mr. Affolter where the Prosecution has failed.

XI) The Defense needs additional time to prepare appropriate motions challenging the newly revealed evidence, to seek a severance in

light of the nature of some of such evidence, and to investigate the facts and circumstances surrounding the discovery of such evidence, and surrounding securing of new witnesses in respect thereto by the government.

WHEREFORE the Petitioner respectfully prays this Court for its Order continuing the trial date for a period of 90 days.

Respectfully submitted this 14th day of September, 1987.

/s/ Larry Fassler

Larry Fassler, pro se

AFFIDAVIT OF SERVICE

I have mailed a copy of the preceding Motion for Continuance, 1st Class postage prepaid, to Bradley Myers, Asst. U.S. Attorney, 707 Florida St., Baton Rouge, LA, by depositing same in the mailbox at East Baton Rouge Parish Prison this 15th day of Sept., 1987.

Larry Fassler, Affiant

NOTE: This Motion was filed in open court the morning of September 15th, 1987, before the trial began.

APPENDIX F

AFFIDAVIT

On or about Sept. 4, 1987, I caused to be sent by Federal Express a Writ of Habeas Corpus petition to the U.S. District Court for the Central District of Louisiana, together with a money order for $120.00 which I had been told by the Clerk's Office was appropriate.

On Sept. 8th I spoke to "Pam" at the Clerk's Office by phone and verified receipt of my Petition. At her direction I spoke again to that Office at approximately 4:45 P.M., at which time a man identifying himself as a "Deputy Clerk" advised me that my Petition would be filed as part of my criminal case file and

not as a separate civil matter, as I had expected and intended and though proper. He also told me that there would be no additional filing fee and that my $120.00 would be returned to me. At the same time he also asked that I send in an additional copy with my own original signature, which I agreed to do and did that same day.

On Sept. 9th the Clerk's Office wrote to me asking for a $5.00 fee before returning my $120.00 money order.

For the foregoing reasons I believed that my Petition for a Writ of Habeas Corpus would be treated as part of my criminal case until I heard differently from Judge Parker on Sept. 15, 1987, in open court.

Signed under penalty of perjury

this 15th day of Sept., 1987.

/s/ Larry Fassler

Larry Fassler

NOTE: This affidavit was filed in open court on Sept. 16, 1987. When tendered to the Court by Mr. Fisher, Judge Parker instructed him to file it in the Clerk's Office, and he did.

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	CRIMINAL NO. 87-019
vs.	)	PETITION FOR A WRIT OF HABEAS CORPUS
LAWRENCE A. FASSLER	)	
and CHARLES E. LEE, JR.	)	

COMES NOW the Petitioner, Lawrence A. Fassler, and petitions this Court for a Writ of Habeas Corpus ordering the release of Petitioner from the Detention Order issued by U.S. Magistrate Stephen Reidlinger on May 19, 1987, for the reasons which follow:

REASONS WHY THE WRIT SHOULD ISSUE

I) The Detention Order is being illegally and unconstitution-

ally imposed as a punitive plea bargaining tool.

II) The Detention Order was imposed in denial of Petitioner's statutory and constitutional rights to confront and answer the allegations and evidence against him.

III) The Detention Order was imposed by other than an impartial Magistrate in violation of Petitioner's statutory and constitutional rights.

IV) The Detention Order imposes an excessive and unnecessary extra burden upon the defense, unjustified by any legitimate regulatory interest of the government, and to that extent violates the Petitioner's constitutional

rights to bail and to aid in his own defense.

STATEMENT OF FACTS

I. FACTS IN SUPPORT OF REASON NUMBER I ARE:

A. On May 29, 1987, DEA Agent Claude Davidson told Petitioner that the detention motion had been made that day by the U.S. Attorney as a diversionary ploy to mislead associates of the Petitioner while the government sought to perfect a secret plea bargain with the Petitioner, and would be withdrawn before it was heard by the Court.

B. On June 1, 1987, U.S. Attorney Brad Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the Petitioner pled guilty to

charges carrying a maximum exposure of 30 years.

C. On June 9, 1987, U.S. Attorney Brad Myers informed Rosemary Bickford and the Petitioner that he would drop the detention motion only if the Petitioner pled guilty to charges carrying a maximum exposure of 20 years.

D. On June 11, 1987, DEA Agent Ed Descenzo of Tucson, Arizona, specifically claiming to speak with the authorization and approval of U.S. Attorney Brad Myers, told defense attorney Rosemary Bickford and the Petitioner that the government would drop the detention motion only if the Petitioner first paid over to the DEA the sum of TWO HUNDRED THOUSAND

to TWO HUNDRED AND FIFTY THOUSAND ($200,000.00 - $250,000.00) DOLLARS.

E. On June 24, 1987, U.S. Magistrate Stephen Reidlinger informed defense attorneys Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the Petitioner agreed with DEA agents in Tucson, Arizona, to act as a confidential informant for them.

II & III. FACTS IN SUPPORT OF REASONS NUMBER II AND III ARE:

A. On June 12, 1987, U.S. Magistrate Stephen Reidlinger issued a detention order in which he stated as reasons that the Petitioner was engaged in the sales of heroin and that according to law enforcement

officials in Arizona the Petitioner had a very violent character.

The Petitioner has never been confronted with any such evidence with the exception of remote hearsay from DEA Agent Gigante which was immediately disclaimed by the U.S. Attorney.

B. On June 24, 1987, in chambers, before a scheduled proceeding on the detention motion, U.S. Magistrate Stephen Reidlinger informed defense attorneys Rosemary Bickford and Anthony Marabella that he would recant his allegations of heroin involvement and threat of violence as reasons for the detention motion, after being informed by the U.S. Attorney, as well as defense counsel that the government

was not alleging those grounds for the detention order.

The Petitioner has never been confronted with the evidence upon which the Magistrate based his declaration of intent to recant.

C. On June 24, 1987, in open Court and immediately following the in chambers session described in (B) above, U.S. Magistrate Stephen Reidlinger once again stated as a reason for maintaining his Detention Order that the Petitioner is engaged in the trafficking of heroin.

D. On June 24, 1987, in open court, U.S. Magistrate Stephen Reidlinger also stated as a reason for maintaining his detention order his belief that no conditions of release could reasonably assure that

the Petitioner would not continue to send others on scheduled flights with the Petitioner's narcotics.

The Petitioner has never been confronted with any evidence nor allegation of such conduct.[1]

IV. FACTS IN SUPPORT OF REASON NUMBER IV ARE:

A. In seeking the Detention Order from which this writ prays release, the United States,

---

[1]During the hearing of June 24, 1987, the Defendant entered exhibits intended to show the Magistrate that the Arizona indictment then pending was based on false testimony by the Arizona detective to the Grand Jury. It is possible that the Magistrate read only the false testimony to the Grand Jury by the police officer and did not read the police transcript of the underlying interview which shows that Grand Jury testimony to be false.

Indeed, on July 10, 1987, the Arizona Superior Court remanded that indictment, making reference to the failure of the officer(s) testimony to accurately represent the facts. That indictment has not been refiled, and the statutory period to do so has expired.

(1) Concedes no risk of flight;

(2) Concedes no danger to witnesses;

(3) Alleges no continuing criminal enterprise;

(4) Has presented no clear and convincing evidence of danger to the community.

B. Two other individuals have been arrested and charged in this case. One, Charles Lee, was released on TWENTY FIVE THOUSAND ($25,000.00) DOLLARS bail. The second, Allen Haysbert, was released on TEN THOUSAND ($10,000.00) DOLLARS bail, not withstanding the fact that at the time of his release he was free on appeal bond from a California conviction for possession

of narcotics in 1984, and also free under an appearance bond for California charges of possession of narcotics in 1986.

C. The Petitioner lives in Tucson, Arizona, and is employed in Burlingame, California.

D. All of the events leading to Petitioner's arrest in Baton Rouge, LA, appear to have occurred in the States of Arizona, California, and New Mexico. Thus, the focus of investigation as preparation of Petitioner's defense is in those states.

E. Petitioner is being detained in Baton Rouge, LA.

F. Petitioner has been ordered by U.S. Magistrate Stephen

Reidlinger to finance his own defense.

G. If free on bail, Petitioner would be earning ONE THOUSAND ($1,000.00) DOLLARS weekly at his employment. While confined, Petitioner's earnings have been reduced to TWO THOUSAND ($2,000.00) DOLLARS monthly.

H. Petitioner's reduced earning capacity while in custody is in jeopardy because he is unable to receive mail from his employer while in custody. Efforts by both Petitioner and his employer to seek redress and/or explanation for this situation from both the Parish Prison and the U.S. Magistrate have been nonproductive.

I. Petitioner has extensive experience and a high degree of skill in the defense of criminal cases, having spent many years in such employ. He has researched, prepared and filed many writs and appellate briefs on behalf of himself and others, several of which have prevailed in courts of various jurisdictions, including the Supreme Court of the United States.

Petitioner has also played a significant and active role in his own defense in other previous prosecutions which were ultimately resolved in his favor.

J. The Petitioner has personal investigative skills and resources which he would use on his own behalf if free on bail.

K. While in parish Prison, Petitioner's only effective means of communication with his counsel and other defense resources in Arizona is by long distance telephone, and is both limited in time and privacy, and expensive in nature.

L. In order to better aid in his own defense, the Petitioner is seeking to overturn the Detention Order, both in <u>propria persona</u> and through counsel. This effort has entailed, and continues to entail, substantial personal and legal expenses to Petitioner which impinge upon, and deprive him of, already limited financial resources necessary for the defense in chief of his case.

M. The cost of Petitioner of maintaining personal and business ties with his family and interests in Arizona is significantly enhanced by virtue of his detention, and to the extent that those costs exceed what they would be in the absence of a detention order, they deprive the Petitioner of already limited financial resources for his defense.

N. Although there is a small and limited "Law Library" at the Parish Prison, Petitioner, as virtually all other inmates of the prison, has no meaningful nor useful access to it.

O. Petitioner has lived in Tucson, Arizona for 41 years, in the same house since 1954, and has all of his personal and business roots

there. He is married and the father of three children, all of whom he currently supports.

ARGUMENT

I

THE DETENTION ORDER IS BEING ILLEGALLY AND UNCONSTITUTIONALLY IMPOSED AS A PUNITIVE PLEA BARGAINING TOOL.

The Detention Motion was made for reasons unrelated to those prescribed by law, and as such it is, prima facie, constitutionally faulty and must be reversed.

Assuming, for the sake of argument, that notwithstanding the statements made by DEA Agent Davidson to the Petitioner, the motive of the U.S. Attorney in filing the motion was pure, it is nevertheless clear that the government's reason for maintaining the motion was illegal and unconstitutional.

On at least three different occasions the prosecution used the threat of the Detention Motion as a plea bargaining tool to coerce a plea from the Petitioner on terms less favorable to him. Such use of the detention motion is contrary to both the statutory and constitutional authority for the motion.

And finally, on June 24, 1987, the U.S. Magistrate who issued the Detention Order, himself indicated to the Petitioner, through counsel, that he would remove the order if the Petitioner would act as a confidential informant for the DEA. Plainly, this is the most serious abuse of a civil regulatory power for purpose of unfairly influencing the outcome of a criminal case, and

is an unconscionable, if not criminal, corruption of any legitimate regulatory purpose of 18 USC.

II

THE DETENTION ORDER WAS IMPOSED IN DENIAL OF PETITIONER'S STATUTORY AND CONSTITUTIONAL RIGHTS TO CONFRONT AND ANSWER THE ALLEGATIONS AND EVIDENCE AGAINST HIM.

By the statements made in his Detention Order of June 12, 1987, U.S. Magistrate Stephen Reidlinger provided conclusive proof that he considered "fact" or "evidence" not before the court when he first issued his detention order. The only other possible explanation for his findings in regard to heroin and violence would be that he created them out of whole cloth.

Further, on June 24, 1987, in chambers, Magistrate Reidlinger, by

agreeing to recant his earlier findings, evidenced his subsequent receipt of other, contrary, evidence on the same issue. It makes no difference that the evidence he entertained out of court was on the one hand hostile to the Petitioner's interests, and on the second hand friendly to the Petitioner; it was equally unconstitutional in both instances.

The invidious nature of such extrajudicial fact-finding is amply demonstrated once again, by the Magistrate's own words for in the proceedings of June 24th, after he had recanted his findings of heroin and violence, he once again used the allegation of heroin involvement as a basis for his ruling.

When, on June 24th, he also claimed that the Petitioner was sending others on flights with the Petitioner's drugs, he was once again basing his order on evidence or allegations not before the Court.

It is unknown where the Magistrate got the serious allegations he used in his rulings from the bench -- but they were not made in court and the Petitioner had no opportunity to confront them.

It makes no difference whether the Magistrate sought out and made independent inquiry of "law enforcement agents", or if the U.S. Attorney whispered in his ear; whichever be the case it is incontrovertible that the Magistrate was both receptive to, and

influenced by, such illegal influence -- as his own words conclusively establish.

III

THE DETENTION ORDER WAS IMPOSED OTHER THAN AN IMPARTIAL MAGISTRATE IN VIOLATION OF PETITIONER'S STATUTORY AND CONSTITUTIONAL RIGHTS.

As set forth in the statement of facts part II and III and argued in the preceding section, U.S. Magistrate Stephen Reidlinger has repeatedly been receptive to, and has used as basis for his findings, facts not legitimately before him. Further, as set forth in the Statement of Facts part I (E), the Magistrate has lent himself to the Prosecution's efforts to coerce a plea agreement from the Petitioner

through illegal and unconstitutional use of the detention motion.

These facts, taken as a whole, or individually, raise such serious doubt as to the impartiality of the Magistrate that they give the appearance of partiality, and, a fortiori, put the authority and respect due the judiciary clearly ont he side of the prosecution.

IV

THE DETENTION ORDER IMPOSES EXCESSIVE UNNECESSARY EXTRA BURDEN UPON THE DEFENSE UNJUSTIFIED BY ANY LEGITIMATE REGULATORY INTEREST ON THE GOVERNMENT, AND TO THAT EXTENT VIOLATES THE PETITIONER'S CONSTITUTIONAL RIGHTS TO BAIL AND TO AID IN HIS OWN DEFENSE.

The existence of the detention order in this case has the unusual effect of severely hampering the Petitioner's defense. This is so

because the Petitioner is an able and experienced paralegal capable of great service to his own defense, but he is unable to use his own personal skills and abilities under his present conditions of detention.

The detention order also severely hampered the Petitioner's ability to finance his defense -- as ordered by the court -- because it imposes substantial extra costs on the Petitioner. These extra costs include those related to the fight against the detention order itself -- unusually justified in view of this Petitioner's personal legal skills -- as well as the costs of long distance calls, the hiring of investigators and paralegals to do work this Petitioner would normally

do himself, the extra travel costs for legal aides to come to Baton Rouge from Arizona and California for consultation and the many additional indirect expenses imposed by the unusual distances involved in this case between the situs of most investigation activity and the site of his detention in Baton Rouge.

The detention order and the actual conditions of detention in this cause also impose a discriminatory financial penalty on the Petitioner by substantially reducing his earnings. As testimony at the initial appearance and at the detention motion hearing established, the Petitioner would be earning $1,000.00 a week if free on bail, but is earning only $2,000.00 a

month while confined. Further, even these limited earnings while confined are now jeopardized by the Petitioner's inability to communicate by mail with his employer while in the Parish Prison.

These adverse effects of the detention order on the Petitioner's ability to personally assist in his own defense and to most effectively marshal his limited financial resources toward his own defense, when compared to the minimal -- if even sufficient -- justification for the detention order combine to have the constitutionally infirm effect of denying the Petitioner his right to assist in his own defense, as well as his right to bail, to a degree unjustified by the legitimate

regulatory interest of the government. Hence, the detention order in this case is unconstitutional and should be set aside.

CONCLUSION

The detention motion was made for reasons other than those authorized by statute, and as such it should be set aside.

The detention motion has been maintained and used for plea bargaining purposes, and as such is a travesty of the American heritage of criminal justice and constitutional law, and must be set aside.

The detention order was imposed by a Magistrate who received and was influenced by facts not in evidence, in violation of statute and of

constitutional authority, and must therefore be set aside.

The detention order was imposed by other than an impartial magistrate and as such it must be set aside.

The detention order imposes an excessive and unnecessary extra burden on the defense, totally out of balance to the slight -- if even sufficient -- regulatory interest of the government, and is therefore constitutionally impermissible and must be set aside.

RESPECTFULLY SUBMITTED this ___ __ day of August, 1987.

LAWRENCE A. FASSLER
PETITIONER

STATE OF)
) ss.
COUNTY OF)

AFFIDAVIT

I, LAWRENCE A. FASSLER, being first duly sworn upon my oath, depose and state that to the best of my knowledge, the facts contained in the foregoing Petition for a Writ of Habeas Corpus are true and correct.

LAWRENCE A. FASSLER

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1987, by LAWRENCE A. FASSLER.

NOTARY PUBLIC

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
SEPTEMBER 30, 1987
PARKER, C.J.

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 87-789-A

LAWRENCE A. FASSLER

* * * * * * * * *

Lawrence A. Fassler has filed a pro se petition for a writ of habeas

corpus[1] seeking to be released from the detention orders issued by the Magistrate on May 19, 1987, and June 24, 1987. The government has filed a written response. The court finds that there is no need for an evidentiary hearing and that the writ should be denied for the following reasons.

Fassler's argument is that the detention order was illegally and

---

[1]Although habeas corpus is generally a post-conviction remedy, the federal courts have in certain circumstances considered writs of habeas corpus brought prior to trial under 28 U.S.C. §2241(c)(3). See **Braden v. 30th Judicial Circuit Court of Kentucky**, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (habeas corpus proceeding brought by state court prisoner on speedy trial grounds); **Gully v. Kunzman**, 592 F.2d 283 (6th Cir.), cert. denied 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979) (habeas corpus proceeding brought by state court prisoner on double jeopardy grounds). In this case, the court has the power to entertain Fassler's writ under §224(c)(1) since he is in custody in this district "under or by color of the authority of the United States."

unconstitutionally imposed as a punitive plea bargaining tool. Essentially, Fassler claims that the Assistant United States Attorney would not have made or pursued the motion for detention order if Fassler had agreed to plead guilty and paid the Drug Enforcement Agency the sum of $250,000. The government denies the latter allegation.

Accepting Fassler's allegations as being true, the court finds no merit in this argument. Initially, the court notes that Fassler filed his petition on September 10, a few days before his trial on September 15 - 16, which resulted in his being found guilty on both counts of the indictment. Since Fassler did not plead guilty, the alleged illegal

plea bargaining tactics of the prosecutor would seem to be irrelevant. Furthermore, since Fassler is no longer being detained upon the detention order that the government moved for under 18 U.S.C. §3142, but is being detained under §3143 by virtue of his being convicted, the issue is now moot.

Although the other grounds raised in the writ may likewise be moot, the court will consider these arguments in view of the fact that they could possibly be relevant to a motion for release from his present detention under §3143. Fassler's second and third grounds are that the magistrate considered matters that were not in evidence thereby depriving him of his right of con-

frontation and raising "serious doubts" as to the impartiality of the magistrate.

These argument have no merit. The court has previously conducted a de novo review of the magistrate's detention orders and has carefully reviewed the transcripts of the hearings and exhibits, as well as additional evidence presented in this court. As indicated in the court's ruling on September 10, 1987, there was clear and convincing evidence to support the magistrate's conclusions. The court further found the magistrate's reasons to be well founded.

Fassler's final argument is that an "excessive and unnecessary extra burden . . . unjustified by any

legitimate regulatory interest of the government" was placed upon him at the detention hearings. Fassler claims that this extra burden violated his constitutional right to bail and to aid in his own defense.

In ordering Fassler's detention, the magistrate and the court acted pursuant to 18 U.S.C. §3142. Essentially then, Fassler is challenging the constitutionality of §3142, which authorizes the pretrial detention of arrestees charged with serious felonies who are found to pose a threat to the safety of the community which no condition of release can dispel. A similar argument was made and recently rejected by the Supreme Court in **United States v. Salerno**, _____ U.S. ____,

107 S.Ct. 2095, ____ L.Ed.2d (1987). The court further finds Fassler's argument relating to his inability to prepare his defense to be unpersuasive. Fassler has failed to point to any specific prejudice to his defense, nor has he in any way suggested that the preparation by his attorney has been inadequate.

Accordingly, the petition for writ of habeas corpus has no merit and will be DENIED.

* * * * * *

/s/ JP

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

LAWRENCE A. FASSLER

CIVIL ACTION

NO. 87-789-A

J U D G M E N T

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that petitioner's writ of habeas corpus be, and it is hereby DENIED.

Baton Rouge, Louisiana, October 6, 1987.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
OCTOBER 26, 1987
PARKER, C.J.

LAWRENCE A. FASSLER

CIVIL ACTION

VERSUS

NO. 87-789-A

UNITED STATES OF AMERICA

* * * * * * * * *

Petitioner, Lawrence A. Fassler, has filed a pro se "Motion For Rehearing" on the denial of his petition for writ of habeas corpus, claiming he was unfairly deprived o an opportunity to respond to the government's answer to the writ. Fassler also filed a "Reply to Respondent's Answer" in support of his motion for rehearing.

A review of these pleadings discloses no new arguments pertinent to the habeas corpus petition, which relates solely to the detention orders. Fassler's additional claims of prejudice relating to evidence presented at trial are not within the scope of these proceedings.

Accordingly, the motion for rehearing is without merit and is hereby DENIED.

Baton Rouge, Louisiana, October 26, 1987.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX J

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

CHARLES LEE, JR. AND LAWRENCE FASSLER

CRIMINAL NO.: 87-19-A

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared:

MICHAEL STEPHEN SHEPHERD

Who, being duly sworn, deposed and said the following:

I was contacted by Attorney Nathan S. Fisher to view and listen to a V.H.S. Videotape involving a client of Mr. Fisher's. With no knowledge other than it involved an

unnamed client, I attempted to electronically process the audio portion of the V.H.S. Videotape, with the goal of transcribing the conversation(s) of the tape.

The audio portion of the tape was found to have broad band radio "Noise" (static, hum, etc.) to a degree generally equal to that of the actual transmitted signal on the audio recording.

After trying numerous combinations of equalization and noise reduction techniques, I found it would be impossible to transcribe the audio accurately, if at all.

I requested information from Mr. Fisher as to whether the individuals on the videotape could be possibly speaking in a "cajun"

dialect or accent, and was informed that was not the case.

I was later qualified in Federal Court as an expert witness and testified to the above.

Subsequent to that testimony, I was asked by Mr. Fisher to review and comment on the testimony of government witness Trooper Gurley Hamilton Mixon III.

After several readings of Trooper Mixon's testimony and re-listening to the complete audio portion of the videotape, I have come to the following conclusions:

1.

The audio portion of the videotape is and has always been unintelligible and inconclusive as to anything that may have been said

between the principals on the videotape.

2.

Because of the camera "framing" of the picture and the principals, it cannot be determined which individual is speaking any point, which, when combined with the tape's lack of audio intelligibility renders it impossible to objectively attribute a particular utterance to a specific principal on the videotape.

3.

It is my opinion that the "noise" on the audio portion of the videotape was induced at a point prior to the audio signals exit from the receiver which picked up the wireless microphones's transmission.

By testimony of Trooper Mixon, the transmission distance of 75 to 100 yards was a borderline acceptable distance for reception, especially in the area designated the site; an area very prone to interference from microwave transmission interference from the numerous signal paths in use in that area.

Regarding the testimony of Trooper Mixon that the "noise" was introduced to the system through a wire connecting the receiver to the V.H.S. videotape recorder, I cannot agree with his statement. The noise from an improperly installed or improperly filtered power supply to in an air conditioning system would more readily attack an "in use"

receiver than an interconnecting wire (as stated by Trooper Mixon). Further, had this interference been so strong as to penetrate an interconnecting cable (wire) in the manner described by Trooper Mixon, it would have almost certainly penetrated the wire interconnecting the video camera to the V.H.S. videotape recorder, of which no evidence is seen in the video portion of the tape which is quite clear and free of grounding or static interference.

Additionally in listening to the complete videotape, including the portions after the arrest had occurred, the audio clears with the apparent interruption of the receiver, providing a normal audio track free of interference, this

according to Trooper Mixon's theory, would only have been possible had the interconnecting wire been unplugged at the videotape recorder end.

4.

Due to the factors of distance, geographic location, and analysis of "noises" and interferences heard, it is my opinion and belief that the audio interference occurred between the point of transmission (wireless microphone transmitter) and the point of reception (van housing wireless microphone receiver).

5.

I regard Trooper Mixon's testimony that he (or anyone else listening to the source used to make the videotape) heard a clear or

different quality of audio to be at the very best highly improbable if not impossible. I believe that the videotape represents the appropriate quality of audio transmitted, received, recorded and heard in this situation.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

CHARLES LEE, JR. AND LAWRENCE FASSLER

CRIMINAL NO.: 87-19-A

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared:

LARRY L. WARD

Who, being duly sworn, deposed and said the following:

On or about the twentieth day of October, 1987, I had the opportunity to view and hear a certain recording that I was told pertained to the trial of U.S.A. vs. Lawrence Fassler, et al. I offer the following benefits and professional

opinions as to what I heard and saw on the above mentioned tape.

I heard three distinct signals recorded on the audio portion of the tape. There was a very intense noise, an unmodulated carrier of short duration, and a very weak carrier with modulation somewhat lower in amplitude than the noise level. The minor quieting effect produced by the unmodulated carrier upon the noise leads me to believe that the noise was of the same nature as that of the other signals primarily being received via the antenna system and not through any other wired sources. Having read a portion of the transcript of the trial on September 15, 1987, I can only speculate as to the exact way

that the system for recording the above mentioned tape was connected. There was mentioned a certain "wire" between the receiver and the recorder that was picking up the noise. I do not believe that this "wire" an apparent output connection was acting as a part of the antenna system. Also, it is my understanding that there were no other tap connections to this "wire" connection and that certain signals were heard clearly meaning that there was less of an absence of the noise that was present on the recording. At no time did I hear cessation of the noise to the level that I could understand or comprehend the modulated carrier that was present and mixed with the

noise. From the signals that I heard recorded on the tape, it is my belief and personal opinion that the mixed signals existed throughout the entire audio chain including the actual recording voltage presented to the audio recording head of the recorder and short of some deciphering device of which I have no knowledge were recorded exactly as was received on the antenna of the receiver apparatus.

From years of experience I have found it very difficult to separate signals after mixed when they are of a wide frequency range. A single tone type of signal is easy to filter from a band of frequencies. From experience and facts gained from hearing and viewing the

recorded tape, I do not believe that the recording device was contributing to or was receiving any of the observed noise signal through any other means than the "wire." I base my reasoning upon the fact that I saw no evidence of noise present upon or affecting the quality of the video picture. Experience has shown me that most electrical noise interference of the nature that I heard on the audio recording if introduced through a power source would appear in the output of and device to a more or less extent depending upon the degree of filtering ability of the power supply. An unmodulated carrier received by an antenna system will not reduce a noise that is being received through the power

supply of the receiving or recording device. An unmodulated carrier will have the effect of reducing noise received via the antenna system as in the audio recording that I heard. The carrier must be of sufficient strength to effect this reduction of noise. This action is well known in the radio field as "carrier to noise ratio." In the case of the modulated carrier mentioned as one of the observed signals recorded on the audio portion of the tape, it was very apparent to me that the "ratio" was very poor, the carrier present was so weak as to present very little quieting effect and thus a very low "carrier to noise ratio."

In summary, after reviewing the videotape and transcript of Trooper

Mixon it is my opinion that his statements regarding having heard a more clear conversation than was recorded on the audio portion of the videotape is highly improbable and unlikely.

Further, I submit the following qualifications for the courts perusal:

Larry L. Ward
6628 Highland Road
Baton Rouge, Louisiana 70808
Telephone: (504) 766-4663

Date of Birth: 7-27-38
Age: 49
Employment:

Baton Rouge Broadcasting WJBO, WFMF-FM, Southern States Network

Position: Chief Engineer

Experience and Education:

30 years experience in broadcast engineering and electronics.

Federal Communications Commission Radiotelephone License.
Devry Institute, Electronic Instrumentation and Control.
BS Degree at L.S.U. concentrating in Electrical Engineering, Geology, Nuclear Science, Business and Social Studies.
16 years in two way radio installation and service.
Chief Engineer of Radio Stations since age of 18.
Numerous Applications and Exhibits accepted and on record-FCC.
Four years as electronics in Naval Reserve.
Electronics Instructor WKG Video Electronic College.

I submit the above beliefs and professional opinion based solely on the tape recording and portion of the trial transcript (Trooper Mixon's testimony) that I have reviewed.

THIS DONE AND PASSED in my office in Baton Rouge, Louisiana this 3rd day of November, 1987, in

the presence of the undersigned competent witnesses.

WITNESSES:

/s/ Melissa B. Garrison

/s/ Jill E. Lishank

/s/ Larry L. Ward

/s/ Notary Public

APPENDIX K

U.S. Department of Justice
United States Parole Commission
Chevy Chase, MD 20815

NOTICE OF ACTION

NAME: Fassler, Lawrence
REGISTER NUMBER: 02061-095
INSTITUTION: Phoenix

In the case of the above-named the following parole action was ordered:

Continue to a presumptive parole after service of 100 months, September 25, 1995.

(REASONS/CONDITIONS)

Your offense behavior has been rated as Category Three severity because it involved at least 50 but less than 200 pounds of marijuana. Your salient factor score (SFS-81) is 7. You have been in federal confinement as a result of your behavior for a total of 13 months. Guidelines established by the Commission indicate a range of 12-16 months to be served for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision is mandated in that you have a minimum sentence which exceeds the guideline range.

As required by law, you have also been scheduled for a statutory interim hearing during the docket immediately preceding completion of the minimum term.

SALIENT FACTOR SCORE (SFS-81):
Your individual salient factor score items have been computed as shown below. For an explanation of the salient factor items, see reverse side of this form.
ITEM A = 1; B = 1; C = 2( )*; D = 1;
E = 1; F = 1; TOTAL SCORE = 7

*If Five or more prior commitments, place an 'x' in the parenthesis in Item C.

THE ABOVE DECISION IS NOT APPEALABLE.

DATE: July 14, 1988
REGION: Western
COMMISSIONER: Armstrong
DOCKET CLERK: tmm